A PLAN FOR REGULATING THE TRUSTS.

BY JOHN F. CRONAN.

THE American people have had presented to them for solution many questions of great importance, including in their scope every phase of human endeavor; and it has been their good fortune, except in rare instances, to settle such questions, and to settle them rightly, through the influence of public opinion, crystallizing into law.

Of all these questions, excepting those relating to the severance from the Mother Country and the abolition of slavery, no one of such far-reaching importance, affecting all of the people, has ever occupied their attention, or has been more likely to lead to serious results, than the question of regulating the vast aggregations of capital in the form of trusts, which seek control of all the raw and finished products entering into the daily necessities of the people and into every manner of public utility by which the wants of the people are supplied.

When a comparatively small number of men, able to control unlimited capital through combinations under the seal of the State, are permitted so to conduct their business that the public suffer and every section and class of people are compelled to submit to their exactions, it is not surprising that the people have become aroused and demand relief. State after State has recorded its protest; and the President and Congress, heeding this warning, are struggling with the problem with a view to finding a solution just alike to the people and to the interests affected. But as yet no plan providing for the supervisory control which is essential to the public interest has been presented.

In order to arrive at a correct conclusion as to how this trust question must be dealt with, we should determine what are the evils from which the people suffer through the trusts.

The first and most important evil is overcapitalization.

The second is the unnecessary and unjust degree of protection afforded the trusts through the tariff.

The third is the failure of any substantial or uniform regulation by which the affairs of the corporation are made known in annual or more frequent reports.

The fourth is the lack of any legislation affording substantial protection in the way of supervising the power against discrimination or injustice, except by the cumbersome process under the Sherman Act; while, at all stages of its corporate existence, in its dealings with the public, the trust is under the protection of the Federal Government to the moment of judicial decision declaring the trust a monopoly in restraint of trade.

There may be differences of opinion as to whether the order of classification here stated is correct from the standpoint of relative importance; but it is believed that the chief difficulty will be found to arise from the inflated and illegitimate valuation which, in the absence of supervisory control, is solely within the discretion of the promoters. The ability to fix the capitalization arbitrarily, and the necessity, once this value is fixed, to give it in the eyes of the public an actual value, necessitates the uprooting of competition and the enforcement of economies by reduction in the number and salaries of employees, and, lastly and perhaps most important, by reduction in the price of the raw material and increase in that of the manufactured article.

While the other evils in the above classification are of great importance, they are restricted in their general power to harm, as compared with the widespread injury which not only follows the creation and practical working of the combination, but in fact constitutes the real inducing motive and furnishes the temptation which leads to the merger or consolidation of interests by which the trust is created. The course here outlined, if it would not prevent, would at least aid in controlling, the evil.

It is popularly asserted that the trusts are the creatures of the tariff, but this is not wholly true. Trusts which operate in protected articles are undoubtedly benefited, but many of the great trusts are not affected by the tariff. It should not be forgotten that the people have, at all times, under their own control the power to compel such a revision of the tariff as will remove any difficulty arising from the tariff; and, though the allied

power of wealth may be able to defer such revision, it is nevertheless in the power of the voters of this country to compel such revision of the tariff as may be necessary in the public interest.

In many quarters it is asserted that the trusts are the result of an economic force, the result of natural laws, but it will be found on examination that this is not correct. The real force underlying the trusts is the desire for power and wealth which seeks to gratify itself through ability to control the raw and finished materials, whereby the market for the producer is limited while the price to the consumer is regulated.

The many business establishments which for years have flourished in this country could not be forced out of the hands of their former conservative controllers without some great and overwhelming inducement—that inducement was the power to capitalize at the will of the promoters of the trusts. So that, granting the force of the contention respecting the influence of the tariff, and assuming a revision on a just and fair basis, we are still without remedy to control the creation of the trusts. The conclusion seems inevitable that, if we are able to reach a basis as to the real inducement which leads to their formation and find it is due to the failure of existing laws to exercise that supervision which would prevent the exploiters from fixing a capital at their discretion, we shall be able to strike at once at the root of the evil by compelling submission, in the first instance, to an authority which will fix the value of the corporation, or business interests to be merged, at their true value. So that if the corporation or business sought to be merged into the trust found that no substantial advantage beyond the actual value was to be obtained by turning its corporation or property over, there would be ordinarily no temptation to do so.

To make the application, let us consider what would be likely to be the answer of the president of a well-conducted and paying corporation who was invited to turn over his corporation, with others in like business, to form the trust, solely upon receiving the value thereof. As a rule, there would be but one answer—a refusal. Threats of destruction by competition might be made, difficulties there might be to face, but these are the incidents of business and usually must be met under all circumstances. The promoters of a trust will find grave, if not insurmountable, difficulties in forcing a merger or consolidation of

corporate interests, when the power to fix the capital applicable to the payment for the property to be acquired is taken from the individuals forming the trust, and placed in the hands of honest and competent men acting as a commission with full power to decide the true value of the property.

Let us consider from what source this supervisory power should come. The wide differences in the corporation laws in the various States preclude any hope of relief from that source in the absence of a constitutional amendment, and it is extremely doubtful, in view of the revenue which the various States receive from corporations, if any effective amendment to the Constitution could be adopted. The only hope of dealing with the problem, therefore, is with the Federal Government.

In taking over a corporation, but little difficulty would be experienced in determining the value of the tangible, active or live assets of the business. The difficulty comes in determining the value of the good-will, trade-marks, patents, etc. In the absence of supervisory power, the valuation of the latter elements of property is left wholly to the promoters of the enterprise. There can be urged no ground of objection to a corporation whose capitalization is restricted by reasonable and fair limitations under proper control or regulation. That is, a corporation which is honestly capitalized issues its certificates of stock, and these to the extent of the issue represent the true value of the property of the corporation. The State receives its tribute in taxation, the stockholders as a rule receive a fair return, and there is no reason for forced economies in dealing with the employees or arbitrary inflation of prices, in order to earn a dividend.

But when, in the absence of regulation, the capital has been inflated to a point many times in excess of the true value of the assets of the corporation, it is obvious that, to enable this artificial capital to net the promoters a substantial return, there must be manipulation of the price at which the products can be bought and sold, operating unjustly to the producer and consumer, and the forcing of economies resulting in many instances in the loss of employees who have been sacrificed to pave the way for dividends to give the inflated stock a market value.

This, however, is not the limit of the promoters' enterprise. They go beyond the methods here described. In the ordinary case of the shares of common carriers or *quasi*-public corporations

offered to the public through the medium of the Stock Exchange, certain regulations are prescribed requiring a sworn statement of the assets of the corporation, its earnings, and the general scope of the business, sufficient to enable a man to form a judgment of the value of the property which forms the basis of the market price from time to time. But in reference to many of these large industrial corporations a departure was made by the Stock Exchange; these corporations, being unable or unwilling to comply under oath with the requirements showing the actual value of the property and its true condition, were permitted to have their securities placed in the unlisted department of the Exchange. The real reason for declining to submit to the Stock Exchange requirements was an unwillingness to expose the inflated value placed upon their intangible assets and in many cases upon their live assets, and thus hide from the public the true value, affording an opportunity to the "insiders" to juggle with their securities and make and unmake the market price thereof. In this way, they are afforded all the advantages of the Stock Exchange, while escaping the regulations it has established for the protection of the public. Had the Stock Exchange taken an heroic stand, subordinated commissions to principle and refused its privilege of selling securities to such corporations as were unwilling to place true information as to their condition within access of the public and comply with the conditions imposed upon honest and well-regulated corporations, they would have been unable to foist their securities upon the public, and one phase of the evil complained of would have been remedied.

This branch of the matter is referred to because of the claim that the remedy lies in greater publicity in corporation matters. While this would, doubtless, afford some protection to investors and give some knowledge of the inner working of the combination, it is believed to be altogether too narrow a remedy to affect substantially the conditions which are at the foundation of the evil.

The effect of the recent suggestion of Commissioner Garfield as to a Federal license for corporations doing an interstate business would be to put the Federal Government in closer touch with the corporations, and afford the Government an opportunity to deal in many respects more effectively with the corporations than at present. But the trusts are creatures of the several States, and the plan proposed by Mr. Garfield would in no

manner prevent their formation, although it might be helpful in removing the difficulties which their existence creates. His suggestion has provoked some discussion from corporation attorneys of high standing and from trust officials. They apparently would be willing to submit to Federal regulation in accordance, for example, with the suggestion of Mr. James B. Dill, if the problem could be worked out by the passage of a law permitting corporations to be chartered by the Federal Government, under the belief that their business could be thereby so regulated as to afford full measure of protection.

The difficulty with this proposition is, in the first place, a constitutional one. It is seriously to be doubted whether the Constitution, which in its present form reserves to the several States the right to create corporate existence, does not preclude the Federal Government from exercising any powers not expressly delegated to it under the Constitution. If, for the sake of argument, it be granted that under the commercial clause of the Constitution the power to control implies a right to create, and that Congress has power to provide a law for Federal incorporation, it is very clear that the several States would be loath through their representatives in Congress to express approval of an Act which would deprive them of the revenue which by the creation of these corporations they now have. But if, upon full consideration, it were found that to provide for Federal incorporation there must be an amendment to the Constitution, the hostility of the several States would prevent its adoption.

While it is very clear from the two recent decisions of the Supreme Court construing the Sherman Anti-trust Law that, under its provisions, a monopoly can be crushed, it will nevertheless appear that that legislation has proved inadequate to cope with many of the serious phases of the difficulty. That Act was not designed to control the merger of corporations, or to have any influence upon the creation of the trusts. It seeks to prevent combinations operating as a monopoly to the public detriment, to prevent imposition; but the people have suffered as much from the existence of trusts since the passage of that Act as before; and, however well disposed the Government may be to enforce the law, it is well understood that trusts can and do thrive, and the many evils which they create continue, without exposing them to the danger of prosecution under that Act.

Some other way must be found to meet the difficulty, that will deal with the trust from the period of its formation. The means of thus dealing with the question is in the power of Congress, by the passage of an Act wholly within the scope of the commercial clause of the Constitution, regulating interstate corporations and imposing adequate penalties for its violation.

Such legislation should provide for the appointment by the President of a Federal Commission, or for the enlarging of the powers of the present Interstate Commerce Commission, to which all corporations hereafter formed to do an interstate business must first apply for a certificate of capitalization, which shall determine the value of the corporate property and fix the amount of capitalization and the method of payment for the same in the issue of bonds or stock. Armed with such a certificate of capitalization, the incorporators may apply to any State and secure a charter. No corporation thereafter formed shall have the power to transact business without such certificate. The Commission shall have the power to send for papers and to summon persons to its hearings, and to punish for contempt. No increase or reduction of the capitalization of any corporation doing an interstate business shall thereafter be made without the approval of the Commission. All corporations now or hereafter organized shall file reports annually, giving a true statement of their property and condition, in such detail as the Commission shall prescribe. All corporations doing an interstate business shall be required to have a Federal license, in accordance with the recent suggestion of the Department of Commerce.

Such commission must have the power to receive and hear complaints of unjust discrimination, and if, upon complaint, after a fair hearing, a corporation shall be found guilty of discrimination, or of fixing an unjust price or rate for its commodities or service, the Commission must have the power to impose a penalty sufficiently large to be prohibitive, with the additional power of depriving a corporation, for cause, of its right to do an interstate business by the revocation of its license.

No corporation shall have the power to lease or in any way acquire the property of another corporation without approval by the commission of the terms on which the same is acquired.

That such legislation can be sustained is made clear by many decisions of the Supreme Court of the United States defining the

powers of Congress under the Constitution to deal with interstate commerce.

The commercial power conferred by the Constitution is one without limitation, including all the subjects of foreign and interstate commerce, the persons engaged in it and the instruments by which it is carried on; and while these powers are stated in broad and general terms and with no attempt to formulate a detailed code, "they possess an elasticity responsive to judicial interpretation, capable of adaptation to the needs of the people as evolutionary changes may require."*

Senator Knox, when Attorney-General, speaking of the power of Congress, said:

"If Congress, under the power to regulate interstate commerce, may utterly destroy a combination and forfeit its property in interstate transit, as the Sherman Act provides, it seems reasonable to say that it can, in the exercise of the same power, deny to a combination whose life it cannot reach the privilege of engaging in interstate commerce, except upon such terms as Congress may prescribe to protect that commerce from restraint. Such a regulation would operate directly upon Congress, and only indirectly upon the instrumentalities and operations of production."

And the late Senator Hoar, speaking of the power of Congress to deal with the subject, said:

"This bill depends for its validity on the constitutional power of Congress to regulate international and interstate commerce. It exercises that power by prohibiting artificial beings created by a power other than its own from engaging or continuing in such commerce, except on certain strict conditions."

It is believed that the legislation proposed will effectually control the situation, and that the immediate effect will be to prevent mergers resulting in these huge trusts. This step being gained, the avenues of trade will be left open for that orderly and healthy competition which is the life of trade; and, under its stimulus, this country will be able to maintain its position in the front rank of commercial Powers.

The aim of the proposed legislation is not radical or revolutionary. Its main principle has been in force in many States,

* Sherlock *vs.* Alling, 93 U. S., 99; Addyston Pipe Co. *vs.* U. S., 175 U.S., 211; Gibbon *vs.* Ogden, 9 Wheat., 1; Kidd *vs.* Pearson, 128 U. S., 120; Brown *vs.* Maryland, 12 Wheat., 419; *In re* Debs, 158 U. S., 564.

notably in Massachusetts, in the power vested in the Boards of Railroad Commissioners and Gas and Electric Light Commissioners, not only to fix the issue of capital but also to exercise general supervision. The Railroad Commissioners have authority to recommend as to rates for transportation, with the right to appeal to the Legislature if such recommendations are not adopted; while the Gas and Electric Light Commissioners have full authority to fix the price charged for lighting.

The public demand and must have relief, and we should approach the question of solving the difficulty in a fair and candid spirit, not in a spirit of reprisal as some would exhort—as, for example, the suggestion of a concerted withdrawal of deposits from the Banks and a sale of all stocks and bonds. The problem is a difficult one, but it should not on that account be avoided.

If it shall be said that the legislation above outlined is limited in effect and applies only to trusts doing an interstate business, the answer is that it is only when the trust attains the dignity of entering the larger field of operations constituting interstate commerce that its power to harm becomes so general as to cause widespread injury to the public.

If it shall be urged that such legislation seeks to centralize the powers of Government, the answer is that there is no other plan proposed which will not only control, but will also tend to prevent the existence of, the trusts.

It is better that the Government should be strengthened, even at the expense of the criticism of centralization, than that the people shall be subjected to injustice; far better a Government of the people strong and resolute, than weak and inefficient.

The main proposition requiring supervision will doubtless meet with criticism, chiefly, however, it is believed, from two sources. Those who see at once that the unlimited power of exploitation which the trust promoters have been able to exercise must thereafter be subjected to supervision, will claim that the plan involves an unnecessary restriction upon the development of capital and business. But the necessity for curtailment of this power has been made so apparent in a recent special message of the President to Congress, and in other ways has become so obvious, that the argument will be powerless to influence a fair and reasonable mind. The second source of criticism will doubtless be found among the adherents to the strict doctrine of State

rights; but reflection will show that no power of the State is invaded, and that there is no legitimate basis for the contention that the proposal in any way involves the rights of the State.

The delegation to a commission of authority to impose penalty for discrimination will, it is believed, provoke more serious opposition; but, looked at squarely, from the standpoint of justice, the objections can be met and answered. The trusts seek and secure from the Federal Government, as they are entitled to do, full measure of protection for their property in transit. Against whom is this protection sought? From the overt acts of the people, the very source from which the Sovereign receives its power. The Government stands, then, between the trusts and the public, with corresponding duties and obligations. What is the measure of such duties? To protect the interests of each. If, then, the corporation seeking protection from the Government in the proper conduct of its business is guilty of injustice to the public, the Sovereign would be impotent and wholly inefficient if it were not able to discharge these correlated duties. The people, from whom the Government receives its authority, complain of discrimination or undue exaction. The charge, after a fair hearing, is found by the Commission to be true. The body created to represent the Government has been clothed with authority to impose a penalty, and it is conjuring with the very objects of government to assert that that Government is powerless to act and administer justice in accordance with the obligation resting upon it. Shall we say that, while reaching out with one hand to protect the corporation, it cannot with the other prevent that sarie corporation from doing injury to the people, whom, in the exercise of its sovereign power, it has restrained from doing injury to the corporation, the very agency causing the injustice.

We have the right to regulate these corporations when necessity demands; if they decline to submit to regulation, they must cease to exist. Trusts are not necessary evils, they are not necessary at all; and the sooner the sovereign power of the Federal Government is asserted, that the octopus of wealth may not enthrone itself in the Hall of State, the better.

JOHN F. CRONAN.